Nos. 10-238, 10-239

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF IOWA, CONNECTICUT, MARYLAND, NEW MEXICO AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI* STATES

Amici states confront significant issues of citizen confidence in both state and national governments. We wish to share our view that public financing of state elections should remain available as a tool to restore public confidence.

While specific sources of discontent vary from state to state, at the root of the problem is a sense of powerlessness among the citizenry, powerlessness in the face of large governments and other ever larger financial and business institutions. Whatever one may think of changes proposed by the Tea Party movement, its existence may be traced rather directly to the frustration of ordinary people concerning the sources of and responses to the recent financial crisis.

In Arizona, a number of well-documented cases of corruption in government spurred its citizenry to initiate this matching fund form of public financing to address a central source of public discontent. Such problems have not been unique to Arizona.

In Iowa and other states whose judiciary face one form of election or another, the courts may confront a similar lack of confidence. In states with elected judges, campaigns heavily financed by the plaintiffs' bar on the one hand, and the defense bar, insurance companies and other large organizations with important business before the courts on the other, have surely eroded public confidence in the fundamental concept of equal justice before the law. *See, e.g.*,

Caperton v. A.T. Massey Coal Co., ___ U.S. ___, 129 S. Ct. 2252 (2009); John Grisham, *The Appeal* (2008).

Iowa is among the states with a nonpartisan, merit system of judicial selection and the justices of the Iowa Supreme Court stand for periodic retention elections. From the 1960s until 2010, no Iowa justice had been voted off the high court. Indeed, there had never been what one could consider a "campaign." In 2010, all three justices standing for retention were ousted by a campaign with the latest versions of negative attack ads, financed by well over one million dollars, largely from non-Iowa sources. The response to the campaign by the organized bar and other citizens in support of the justices was clearly too little and too late. While Iowa's judges do have the First Amendment right to speak out in support of their record, solicitation of funds to spend on such speech is not only troubling as a matter of judicial ethics, it can only further erode citizen confidence in equality before the law.

Whether Iowa will follow the lead of other states that provide public financing in judicial elections is unclear, but some form of it might well be considered an appropriate means of restoring confidence. Iowa and other states with concerns about judicial elections should retain some flexibility to generate constitutional solutions to these substantial problems. *See cf.* Deborah Goldberg, Brennan Center for Justice, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* (2002);

American Bar Association, *Report of the Commission on Public Financing of Judicial Campaigns* (2002).

Beyond the problems of the current era and the specific issue of public financing for state elections, amici states are concerned for the larger implications for federalism presented here. This case plainly involves the citizens of a state addressing the basic structure of their government. If federalism means anything, it surely means the judgment of a state's people about how they are to be governed ought to be heard and considered by the courts of our nation.

SUMMARY OF THE ARGUMENT

Numerous states, including Arizona, have enacted schemes to publicly finance elections in order to combat the threat of actual or apparent corruption in the political process. As part of that effort, Arizona's statute provides for matching funds triggered upon an opponent's or a third party's independent expenditures. This provision does not implicate First Amendment concerns. The statute does not curtail the right of a nonparticipating candidate to solicit contributions or make expenditures. Nor does the statute place a ceiling on the amount of independent expenditures allowed by or in favor of nonparticipating candidates. Assuming a nonparticipating candidate's First Amendment right to free speech is implicated, any burden placed on the nonparticipating candidate is highly indirect and minimal. As a result,

the Act should be analyzed under the exacting scrutiny standard of review. Amici agree with the Ninth Circuit that the Act does not offend the First Amendment as Arizona's interest in combating corruption or the appearance thereof is substantially related to its public financing scheme.

ARGUMENT

I. Arizona's Citizens Clean Elections Act.

In the wake of numerous political scandals, the people of Arizona adopted the Citizens Clean Elections Act in 1998 by statewide referendum. Ariz. Rev. Stat. §§ 16-940-16-961 (2009). The Act's stated purpose is "to create a clean elections system that will improve the integrity of Arizona state government. . . ." *Id.* § 16-940.

The Arizona Act, like many other similar acts, creates a multi-tiered system of public financing. A candidate who wishes to participate in the system must collect a threshold number of $5 contributions during a specified period in order to demonstrate his or her electoral viability. *Id.* § 16-946. The threshold necessarily changes depending upon the office the candidate is seeking. *Id.* § 16-950(D). Upon reaching the threshold, the participating candidate will receive a lump sum grant of funds for use in the primary campaign. *Id.* § 16-951. The amount of the lump sum is again dependent on the office sought. *Id.*

Another round of funding is available to a participating candidate if (1) his or her nonparticipating opponent spends more in the primary than the initial grant, or (2) the opponent's expenditures combined with the value of independent expenditures in opposition to his or her candidacy, or in support of his or her nonparticipating opponent, exceed the amount of the initial grant. *Id.* §§ 16-952(A), (C). If eligible, the participating candidate receives "matching funds" in the amount of the opponent's combined spending, plus the value of independent expenditures, reduced by six percent and reduced by the amount of "early contributions" raised by the nonparticipating candidate during the preprimary fundraising period. *Id.* § 16-952.

This process – the initial lump sum plus the possibility for future matching funds – is repeated during the general election. *Id.* In both the primary and general election, however, the amount of the matching funds is strictly capped. *Id.* § 16-952(E). "Matching funds" cannot exceed three times the amount of the initial grant. *Id.* In exchange for the initial lump sum and the possibility of future matching funds, participating candidates agree to forego the right to finance their campaign through private contributions. Candidates who choose not to participate in the system remain free to raise unlimited contributions from private sources, subject only to individual limits on contributions and disclosure requirements, which existed prior to the Act. Nonparticipating candidates, therefore, are free to raise

contributions far exceeding those available to participating candidates through matching fund contributions.

Six past and future candidates for political office in Arizona, who have or plan in the future to run privately-financed campaigns, along with two political action committees who fund such candidates, sued to enjoin operation of the Act's matching funds provision. The plaintiffs alleged the Act violated their rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Although the district court made factual findings adverse to the plaintiffs, the district court granted the plaintiffs' motion for summary judgment, issued a declaratory judgment that the matching funds provision of the Act violates the First Amendment, and enjoined its enforcement. The State of Arizona appealed. The Court of Appeals for the Ninth Circuit joined the prevailing circuit view and reversed the decision of the district court, finding no First Amendment violation. *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010); *see also N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008); *Daggett v. Comm'n on Govern. Ethics & Elec.*, 205 F.3d 445, 455 (1st Cir. 2000). This Court granted certiorari and stayed enforcement of the Act pending appeal. *McComish v. Bennett*, ___ U.S. ___, 130 S. Ct. 3408 (2010); *McComish v. Bennett*, ___ U.S. ___, 131 S. Ct. 644 (2010).

II. Arizona's System of "Matching-Fund" Public Financing Presents No First Amendment Issues.

The First Amendment precludes Congress from making laws "abridging" the freedom of speech. U.S. Const. amend. I. Since the Civil War, one or another provision of the Fourteenth Amendment has restricted state laws in a similar manner. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630 (1925).

Neither the text of the First Amendment nor the history surrounding its adoption provides a comprehensive guide to its interpretation. We do know, however, that the amendment, like many other provisions of the Constitution, was designed to remedy problems or concerns presented by the colonial experience. Forms of "prior restraint," such as the licensing regimes operating for several centuries in England, were not to be utilized by the United States. *See generally* Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53 (1984). Persuasive evidence indicates that the founders also objected to sedition laws, which enforced by criminal punishment the notion that the monarch was beyond criticism. In short, the central concern was *censorship* of views critical of those in positions of power. Censorial intent, then, would seem to be a key to the concept of "abridging."

There is nothing in the Arizona law that serves to suppress *any* viewpoint, much less criticism of state

government. There are no criminal laws, no licensing schemes, no authorization of injunctive relief or other civil remedies that might "chill" expression, and no restrictions on the independent expenditures of private funds in the political arena. Not directly, not indirectly. As Judge Kleinfeld so clearly stated below, "Since this law does not limit speech, it does not violate the First Amendment." *McComish*, 611 F.3d at 529 (Kleinfeld, J., concurring).

On the contrary, public financing will generally make more funds available for speech and thus create *more* speech. As Justice Scalia concludes, "Given the premises of democracy, there is no such thing as *too much* speech." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 259 (2003) (Scalia, J., dissenting in part). Or, as the first great champion of First Amendment rights, Justice Louis Brandeis, put the point, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 649 (1927) (Brandeis, J., concurring).

Plaintiffs below sought to invoke the First Amendment by claiming Arizona's public financing law "burdens" their exercise of protected political speech by "punishing them for making, receiving or spending campaign contributions." Amici states will demonstrate that claim is both insubstantial and unsubstantiated.

Before coming to that, however, amici would like to share their perhaps larger concern about the use of the term "burden" as a surrogate for "abridge." There are compelling reasons to believe the term "burden" is rather too squishy to perform good analytic service.

Since this Court's decision in *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S. Ct. 876 (2010), many states have in good faith revised their campaign financial laws, including provisions relating to disclosure. A flurry of lawsuits, many from the same source, have challenged these revised laws claiming, for example, that requiring completion of a one-page disclosure form – a 10-minute task – imposes "PAC-like burdens." Such challenges have generally been rejected by the district courts, but they illustrate the difficulties in using an analytic tool that can range from spurious to serious.

It perhaps bears recalling another context in which this Court once utilized the "burden" concept – but now has largely abandoned it – namely, in dormant Commerce Clause jurisprudence. In *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671-76, 101 S. Ct. 1309, 1316-19 (1981), for example, the plurality opinion purported to engage in ad hoc balancing of incommensurates, safety and efficiency. Five justices, led by Justice Rehnquist, abandoned that approach. *Kassel*, 450 U.S. at 687-706, 101 S. Ct. at 1325-34 (Rehnquist, J., dissenting). There, as here, ad hoc balancing fails to yield "judicially manageable" standards, principles, or rules of decision, that produce reasonable consistency of results or helpful

guidance to state lawmakers. Federalism will not thrive in such an environment. It may be useful to recall the words of Justice Harlan,

> It has often been said that one of the greatest strengths of our federal system is that we have, in the forty-eight states, forty-eight experimental social laboratories. "State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation."

Roth v. United States, 354 U.S. 476, 505, 77 S.Ct. 1304, 1320 (1957) (Harlan, J., concurring in part and dissenting in part) (quoting Henry M. Hart, *The Relations Between State and Federal Law*, 54 Col. L. Rev. 489, 493 (1954)).

Plaintiffs' claim that the Arizona law "punishes" them is empty rhetoric, unsupported by either logic or evidence. There is nothing in the statute that purports to regulate independent expenditures and no basis for thinking that was the lawmakers' – the people of Arizona – intention. Intent would be required to make "punish" a remotely apt verb. Plaintiffs' evidence also falls short of demonstrating any "unintended consequence" of the law that negatively affects independent expenditures. Indeed, what evidence was produced tended to support the intuition that adding public funds to some campaigns would increase the total money available for political speech.

As Judge Kleinfeld so perceptively noted, the plaintiffs' claims reduce to a concern that their election strategies might need revision. *McComish*, 611 F.3d at 528 (Kleinfeld, J., concurring). But that is not a First Amendment problem. *Id.* The First Amendment protects the expression of ideas; First Amendment jurisprudence is and ought to be entirely neutral concerning which candidates win elections.

Amici would also call this Court's attention to Judge Coffin's well-reasoned conclusion in *Daggett*. Judge Coffin determined:

> Moreover, the provision of matching funds does not indirectly burden donors' speech and associational rights. Appellants misconstrue the meaning of the First Amendment's protection of their speech. They have no right to speak free from response – the purpose of the First Amendment is "'to secure the "widest possible dissemination of information from diverse and antagonistic sources."'" . . . The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures. These facts allow us comfortably to conclude that the provision of matching funds based on independent expenditures does not create a burden on speakers' First Amendment rights.

Daggett, 205 F.3d at 464 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49, 96 S. Ct. 612, 649 (1976)); *see also*

Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 14, 106 S. Ct. 903, 910 (1986) (holding there exists no right to speak "free from vigorous debate").

III. Were the Matching Funds Provision to be Considered a "Burden" on Plaintiffs' Speech, It Does Not Violate the First Amendment.

Assuming, *arguendo*, that Arizona's law does implicate First Amendment concerns, the Court must first determine what level of scrutiny applies to the Act's matching funds provision. Amici assert that the proper standard is "exacting" or intermediate scrutiny.

A. Exacting Scrutiny Applies to the Matching Funds Provision of Arizona's Citizens Clean Elections Act as it is at Most an Indirect Burden on Fully-Protected Speech.

Determining which level of scrutiny applies to a law which implicates the First Amendment involves a two-step analysis, dictated by the type of speech implicated and the degree of burden placed on that speech. The result is three-fold: (1) laws that place a severe burden on fully protected speech are subject to strict scrutiny; (2) laws that place a minimal burden on fully protected speech are subject to intermediate scrutiny; and (3) laws that apply to speech and associational freedoms that are not fully protected are subject to intermediate scrutiny regardless of the

level of burden. *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002); *see also Citizens United*, ___ U.S. ___, 130 S. Ct. at 914 (applying intermediate or "exacting" scrutiny to disclaimer and disclosure provisions even though the act infringed upon fully protected speech because such provisions "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-89, 120 S. Ct. 897, 903-05 (2000); *Buckley*, 424 U.S. at 20-21, 96 S. Ct. at 635-36.

Where no one's speech is curtailed, the standard for constitutionality is one of "exacting" or intermediate scrutiny. The standard is whether the public financing scheme burdens the political opportunity of a candidate in a way that is unfair or unnecessary. *Green Party of Conn. v. Garfield*, 616 F.3d 213, 228 (2d Cir. 2010). The substantive question in this appeal, therefore, is whether the Act's matching funds provision amounts to an undue burden. Amici asserts that even under the most robust interpretation it does not.

First, any infringement or burden on the non-participating candidate's right to free expression is highly indirect. Contrary to Plaintiffs' assertions, the Act does not directly limit or curtail a nonparticipating candidate's speech. In fact, it places no restrictions on the nonparticipating candidate's speech. Nonparticipating candidates are free to raise by contributions as many funds as they can and expend whatever funds they deem necessary throughout the

course of the primary and general election. At most, such candidates are indirectly affected – the Act provides for more funds and presumably more speech by someone other than the nonparticipating candidate. *See Buckley*, 424 U.S. at 21, 96 S. Ct. at 636 (applying intermediate scrutiny to campaign contributions in part because "the transformation of contributions into political debate involves speech by *someone other than the contributor*") (emphasis added).

At its root, therefore, Petitioners are claiming that the *potential* exercise of *another's* First Amendment right chills the exercise of their own right to free speech. *See infra* part II. Such a claim is both unprecedented and highly attenuated. *See Citizens United*, __ U.S. at ___, 130 S. Ct. at 914 ("Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' . . . 'and do not prevent anyone from speaking. . . .' The Court has subjected these requirements to exacting scrutiny, which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' government interest.") (internal citations omitted).

This attenuation is illustrated in *Buckley*. In *Buckley*, the Court analyzed whether the *denial* of public financing violated Equal Protection. *Buckley*, 424 U.S. at 94, 96 S. Ct. at 670. The Court reasoned that access to public financing need only serve an important governmental interest and not unfairly or unnecessarily burden the political opportunity of any party or candidate. *Id.* at 95, 96 S. Ct. at 671. Less

searching scrutiny was justified as the denial of public financing was merely a "denial of the *enhanced* opportunity to communicate with the electorate" and is not an undue burden per se – as potential candidates remained free to raise money from private sources. *Id.* at 95-96, 96 S. Ct. at 671 (emphasis added). Applying that same analysis to the Petitioners' First Amendment claim, it is evident that Petitioners' claim does not amount to a severe burden on their First Amendment rights. If the *direct* denial of access to a public financing scheme is not a severe burden, the *indirect* grant of access to another cannot constitute a severe burden. In other words, granting the opportunity for enhanced speech to your opponent because your speech has already been enhanced is not an undue burden.

Second, any burden on the nonparticipating candidate stemming from the matching funds provision is minimal. Petitioners make no allegation that the allocation of the initial lump sum chills their First Amendment rights. Such an assertion is foreclosed by *Buckley*. Nor have Petitioners challenged the *amount* of the initial lump sum payment. Arizona remains free to increase the amount of the initial lump sum and could increase said amount to the current total cap of initial plus matching funds without offending the First Amendment. Petitioners' argument, therefore, can be distilled to a challenge of the *timing* of the State's public financing and not a challenge to the financing itself. The timing of the matching funds

is not unduly burdensome to the nonparticipating candidate.

Under Arizona's scheme, it is the nonparticipating candidate who is empowered, not the participating candidate. Unlike the initial lump sum grant, a participant's access to and the timing of matching funds is wholly beyond their control. It is the nonparticipating candidate who decides whether to exceed the contribution/expenditure threshold. It is also the nonparticipating candidate who decides when to exceed the contribution/expenditure threshold. Presumably, nonparticipating candidates could use this empowerment for their own benefit and to the detriment of their participating opponents.

Simply because the Arizona scheme provokes a strategic decision on the part of the nonparticipating candidate, however, does not make the Act unduly burdensome. If that were enough, all public financing schemes would contravene the First Amendment because their very existence provokes a strategic decision. This Court, however, has declared that this type of decision does not offend the First Amendment. In *Buckley* the Court noted, "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding." *Buckley*, 424 U.S. at 57 n.65, 96 S. Ct. 653 n.65. Furthermore, the plaintiffs' claim assumes that the nonparticipating candidate's decision to accept contributions or make expenditures is not already a strategic decision regardless of the existence of the matching funds

provision. When and how a candidate speaks during the course of an election is always a strategy decision. At most, the Arizona Act informs this decision, it does not dictate it.

The record developed before the district court substantiates this claim. Although the plaintiffs assert that the scheme has a "chilling effect" on the exercise of their First Amendment rights, the district court found the opposite. The district court concluded that it was "illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on Plaintiffs." The district court based this determination in large part on the Plaintiffs' own testimony, which failed to reveal a *single* instance where a candidate or PAC had refused to accept a contribution or expend funds. The mere fact that the Plaintiffs were aware of the matching funds scheme is not enough of a burden to invalidate the statute.

This Court, moreover, has already rejected the notion that facilitating the speech of some will necessarily curtail the speech of others. In *Citizens United*, Justice Kennedy noted, "This [idea] is inconsistent with any suggestion that the electorate will refuse 'to take part in democratic governance' because of additional speech made by a corporation or any other speaker." *Citizens United*, ___ U.S. at ___, 130 S. Ct. at 910 (internal citations omitted). Any claim of a chilling effect without supporting evidence, therefore, is purely speculative. Speech is not finite. *See Daggett*, 205 F.3d at 464 (noting there is "no right to speak free from response – the purpose of the First

Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources").

Third, in evaluating the degree of burden implicated by the Act it is important to remember what the Act is not. It is not an outright or categorical ban on speech based on the speaker's identity. *See Citizens United*, ___ U.S. at ___, 130 S. Ct. at 876. It is not a discriminatory scheme of campaign financing. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 128 S. Ct. 2759 (2008). It is not a direct limitation on the nonparticipating candidate's right to speak or make expenditures. *Buckley*, 424 U.S. at 1, 96 S. Ct. at 612. As a result, the challenged Act does not create a preferential system under which the right to speak is taken from some so that it may be given to others. The Act is designed to *maximize* potential speech.

Contrary to the district court's view, the Ninth Circuit correctly distinguished *Davis*. In *Davis*, this Court invalidated the so-called Millionaires' Amendment of the Bipartisan Campaign Reform Act (BCRA), which increased campaign contributions based on an opponent's expenditure of his or her personal finances. *Davis*, 554 U.S. at 724, 128 S. Ct. at 2759. First, the Millionaires' Amendment served no government interest. *Id.* at 738, 128 S. Ct. at 2771; *see also Day v. Holahan*, 34 F.3d 1356, 1361 (8th Cir. 1994) (invalidating Minnesota's campaign financing scheme because it served no governmental purpose). As the Court recognized in *Buckley*, a candidate's expenditure of personal funds actually furthers, not hinders, the

government's interest in preventing corruption or the appearance of corruption. *Buckley*, 424 U.S. at 52-53, 96 S. Ct. at 651. Attaching a statutory consequence to "the vigorous exercise of [Davis'] right to use personal funds to finance campaign speech," therefore, presumably would have failed even under rational basis review. *Davis*, 554 at 739, 128 S. Ct. at 2772. Unlike *Davis*, it is undisputed that public financing schemes, like the one at issue here, serve the government's compelling interest in preventing corruption.

Second, the statutory choice presented in *Davis* was illusory. Davis had the option either (1) to curtail his First Amendment privileges and be treated equitably, or (2) to exercise his First Amendment rights and consent to a discriminatory contribution scheme. The choice presented by the Act at issue here is not illusory. The Act does not ask nonparticipating candidates to make Solomon's choice – plaintiffs are not asked to forego certain constitutional privileges in order to exercise others. Instead, like the system at issue in *Buckley*, candidates in Arizona have the right to accept or reject public financing. Those that reject public financing retain the right to raise and spend as much money as they desire.

Because the Act does not place a ceiling on a nonparticipating candidate's expenditures or otherwise amount to an undue burden, the Act is subject only to intermediate scrutiny. *See Leake*, 524 F.3d at 427 (applying intermediate scrutiny to matching funds statute); *Daggett*, 205 F.3d at 455 (same).

B. Arizona's Interest in Preventing Corruption and the Appearance of Corruption is Substantially Related to the Act's Matching Funds Provision.

In order to survive intermediate scrutiny there must be a substantial relation between the Act's matching funds provision and a sufficiently important government interest. Amici asserts that the Ninth Circuit correctly determined that the Act's matching funds provision survives intermediate scrutiny.

This Court has repeatedly "recognized a 'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption'" in the political process. *Citizens United*, ___ U.S. at ___, 130 S. Ct. at 901 (quoting *Buckley*, 424 U.S. at 25, 96 S. Ct. at 638; *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456, 121 S. Ct. 2351, 2366 (2001); *Nixon*, 528 U.S. at 387-88, 120 S. Ct. at 905. This Court has also recognized that public financing schemes are substantially related to achieving this end. In *Buckley*, the Court reasoned that a candidate lacking immense personal or family wealth would necessarily be dependent on private contributions in order to effectively communicate his or her message to the electorate. *Buckley*, 424 U.S. at 26, 96 S. Ct. at 638. "To the extent that large contributions are given to secure a political quid pro quo from the current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-7, 96 S. Ct. at 638. So, too, the appearance of

impropriety associated with large contributions. *Id.* Public financing of elections negates the potential for actual or apparent corruption by eliminating the participating candidate's dependence on large, private contributions. *Id.* at 96, 96 S. Ct. at 671 (holding "[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest").

As a result, states have a substantial interest, if not a compelling one, in enticing candidates to participate in public financing. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996). The Act achieves this end while maintaining fiscal prudence by balancing the need to provide incentives for participation with the need to make the system affordable. If Arizona limited its public financing scheme to an initial lump sum payment, the Act could potentially overly finance some participating candidates making the scheme less financially-viable. Without a tie to the expenditures in a given race, moreover, the state could potentially underfund participating candidates thereby undercutting the candidates' electoral viability. The latter result would likely deter participation by other candidates in the future. The existence of public financing is of little use unless it is affordable and the state makes participation reasonably attractive.

Because Arizona has a compelling interest in eliminating corruption and the appearance of corruption, which is furthered by its public financing

scheme and matching funds provision, the Act does not offend the First Amendment.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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